Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp Bhd & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO MT1 (MT2) 24–248 OF 1997
SURIYADI J
3 JANUARY 2005

Agency — Power of attorney — Power of attorney granted by company — Donor company wound up — Whether power of attorney cancelled due to winding up

Banking — Securities for advances — Banking facilities — Debenture — Sale of land by bank pursuant to power of attorney in debenture — Whether sale of land valid — Whether necessary to go through judicial sale

Companies and Corporations — Debenture — Sale by debenture of charged land — Sale conducted by debenture holder pursuant to power of attorney — Receiver and manager not appointed — Whether necessary for receiver and manager to be appointed

Land Law — Sale of land — Private treaty — Sale of land by debenture holder pursuant to power of attorney — Whether necessary to go through judicial sale

Limitation — Charge — Recovery of sum secured by charge — Sale of land pursuant to powers in debenture — Whether sale time barred — When cause of action accrued

This was the plaintiff's application to set aside the sale by the first defendant ('D1') of certain pieces of land situated in Klang, Selangor ('the said land'). The sale of the said land was made by D1 pursuant to the powers given to it by the plaintiff under a debenture. An order of winding up was successfully obtained against the plaintiff by a third party.

The grounds relied on by the plaintiff in support of its application to set aside the sale were: (a) the sale was time barred; (b) the non-appointment of a receiver and manager to conduct the sale had made the tender invitation for the said land flawed; and (c) the sale should have been subject to s 256(2) of the National Land Code 1965 ('NLC') read together with O 83 of the Rules of the High Court 1980 ('RHC')

In respect of the first ground, the plaintiff alleged that the debenture was exercisable on demand and that the letter of demand was sent by D1 to the plaintiff on 24 July 1989 ('L–15'). As such, the sale of the said land to the second defendant on 24 October 1995 was time barred. A demand for the sum owing by the plaintiff was made pursuant to 'L–15' and this letter stipulated that legal proceedings, including foreclosure proceedings, would be instituted against the plaintiff if payment was not made. A subsequent letter of demand dated 15 May 1995 ('L–6') was sent to the plaintiff and in it, the plaintiff was notified

regarding D1's intention to exercise its right to take possession and control of the said land.

As regards the issue of the non-appointment of a receiver and manager, D1's reply was that its action was in order because it had been appointed as the plaintiff's attorney for the purpose of sale pursuant to the debenture. The plaintiff nevertheless contended that despite D1's right to rely on the debenture, the sale of the said land was flawed because s 256 (2) of the NLC and O 83 of the RHC were not complied with.

Held, dismissing the application:

(1) A power of attorney was a formal delegation, made in writing and usually under seal, empowering the donee (D1), to act on behalf of the donor (the plaintiff). The purpose and powers were defined within the limits of the instrument, and in favour of third parties, rendered all acts done by the donee to be binding on the donor as effectually as if the third parties had dealt directly with the donor himself (see para 13).

(2) In the instant case, a valid power of attorney had indeed been executed appointing D1 as the plaintiff's attorney. This meant that D1 had ample authority, and hence was *prima facie* empowered to sell the said land, particularly since the document had been duly deposited with the High Court and evidentially never challenged (see para 15).

(3) The power of attorney granted to D1 by the plaintiff was not cancelled by the subsequent winding up of the plaintiff (see para 16).

(4) D1, being a secured creditor had chosen the easy way out by relying on the power of attorney contained in the debenture to transact the sale rather than to appoint a receiver and manager to act for it. It was irrelevant whether a receiver and manager was appointed (see para 17).

(5) So long as the provisions of the debenture (more so as the power of attorney was valid) and any other connected statutory requirements had been compiled with, the sale of the said land was good without the necessity of going through the processes of a judicial sale (see para 20).

(6) Accordingly, 'L–15' was not the proper notice of demand connected to the sale of the said land. The correct and proper letter of demand in relation to the enforcement of the debenture was 'L–6'. Since the sale was made on 24 October 1995, it was not time barred (see para 29).

[**Bahasa Malaysia summary**

Ini adalah permohonan plaintif untuk mengetepikan jualan oleh defendan pertama ('D1') berhubung beberapa bidang tanah yang terletak di Klang, Selangor ('tanah tersebut'). Jualan tanah tersebut telah dibuat oleh D1 menurut kuasa

yang diberikan kepadanya oleh plaintif di bawah satu debentur. Sebelum jualan tanah tersebut, satu perintah penggulungan berjaya diperoleh terhadap plaintif oleh pihak ketiga.

Alasan-alasan yang digunakan oleh plaintif bagi menyokong permohonannya untuk mengetepikan jualan tersebut adalah: (a) jualan tersebut telah luput had masa; (b) ketiadaan pelantikan penerima dan pengurus untuk mengendalikan jualan tersebut telah membuat cadangan tender tanah tersebut cacat; dan (c) jualan tersebut sepatutnya tertakluk kepada s 256(2) Kanun Tanah Negara ('KTN') dibaca bersama A 83 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Berhubung alasan pertama, plaintif mengatakan bahawa debentur tersebut boleh digunakan atas tuntutan dan bahawa surat tuntutan tersebut telah dihantar oleh D1 kepada plaintif pada 24 Julai 1989 ('L–15'). Oleh itu, jualan tanah tersebut kepada defendan kedua pada 24 Oktober 1995 adalah di luar had masa. Satu tuntutan untuk jumlah yang perlu dibayar oleh plaintif telah dibuat pada 'L–15' dan surat ini menyatakan bahawa prosiding undang-undang, termasuklah prosiding halang tebus, akan dimulakan terhadap plaintif jika bayaran tidak dibuat. Surat tuntutan berikutnya bertarikh 15 Mei 1995 ('L–6') telah dihantar kepada plaintif dan di dalamnya, plaintif dimaklumkan tentang niat D1 untuk menggunakan haknya mengambil milikan dan kawalan ke atas tanah tersebut.

Berhubung persoalan tentang ketiadaan pelantikan seorang penerima dan pengurus, jawapan D1 adalah bahawa tindakannya betul kerana ia telah dilantik sebagai surat kuasa wakil plaintif bagi tujuan jualan bagi maksud debentur itu. Plaintif bagaimanapun menegaskan bahawa meskipun hak D1 untuk bergantung kepada debentur itu, jualan tanah tersebut adalah cacat kerana s 256(2) KTN dan A 83 KMT tidak dipatuhi.

Diputuskan, menolak permohonan tersebut:

(1) Surat kuasa wakil adalah delegasi rasmi, yang dibuat secara bertulis dan biasanya dengan meterai, memberi kuasa kepada donee (D1), untuk bertindak bagi pihak donor (plaintif). Tujuan dan kuasanya ditafsirkan dalam batas instrumen tersebut, dan menyebelahi pihak ketiga, menyebabkan semua tindakan yang dibuat oleh donee adalah mengikat ke atas donor dan sama kesannya seperti jika pihak ketiga berurusan terus dengan donor itu sendiri (lihat perenggan 13).

(2) Dalam kes semasa, surat kuasa wakil yang sah telah pun disempurnakan dengan melantik D1 sebagai wakil plaintif. Ini bermaksud bahawa D1 mempunyai kuasa yang mencukupi, dan oleh itu secara *prima facie* diberi kuasa untuk menjual tanah tersebut, khususnya memandangkan dokumen tersebut telah pun didepositkan ke Mahkamah Tinggi dan nyata tidak dicabar (lihat perenggan 15).

(3) Surat kuasa wakil yang diberikan kepada D1 oleh plaintif tidak terbatal akibat penggulungan plaintif (lihat perenggan 16).

(4) D1, yang merupakan pemiutang dijamin memilih jalan keluar yang senang dengan bergantung kepada surat kuasa wakil yang terkandung dalam debentur untuk melakukan transaksi jualan daripada melantik seorang penerima dan pengurus untuk bertindak untuknya. Adalah tidak relevan sama ada penerima dan pengurus dilantik (lihat perenggan 17).

(5) Selagi peruntukan debentur (lebih-lebih lagi surat kuasa wakil adalah sah) dan apa-apa keperluan statutori lain telah dipatuhi, jualan tanah tersebut adalah baik tanpa perlu melalui proses jualan kehakiman (lihat perenggan 20).

(6) Sewajarnya, 'L–15' bukan satu notis tuntutan yang betul berkaitan jualan tanah tersebut. Surat tuntutan yang betul berkaitan penguatkuasaan debentur tersebut adalah 'L–6'. Memandangkan jualan telah dibuat pada 24 Oktober 1995, ia bukan di luar had masa (lihat perenggan 29).]

Notes

For a case on sale by debenture of charged land, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 112.

For cases on power of attorney generally, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 988–989.

For cases on private treaty, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3904–3906.

For cases on recovery of sum secured by charge, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2160–2162.

For cases on sale by private treaty, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 3111–3112.

For cases on securities for advances generally, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1816–1975.

Cases referred to

K Balasubramaniam, Likuidator bagi Cosmopolitan Credit & Leasing Sdn Bhd (Dalam Likuidasi) v MBf Finance Bhd [2005] 2 MLJ 201(refd)

Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (In Liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 (refd)

Melantran Sdn Bhd v Corah Enterprise Sdn Bhd & Anor [2003] 2 MLJ 193 (refd)

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd [1989] 3 MLJ 155 (refd)

Wellington Steam Ferry Co (Ltd) (In Liquidation) & Anor v The Wellington Deposit, Mortgage and Building Association (Ltd) (1915) 34 NZLR 913 (refd)

Legislation referred to

Companies Act 1965 s 108
Evidence Act 1950 s 114(e)

Limitation Act 1953 s 6, (1)(a), (b), (c), (d)
National Land Code 1965 s 256(2)
Rules of the High Court 1980 O 83

Gregory Dicom (AG Dicom & Co) for the plaintiff.
KK Wong (Amilia Ibrahim with him) (Lee Hishammuddin) for the first defendant.
SS Muker (Muker & Associates) for the second defendant.

Suriyadi J:

[1] The first defendant by a letter of offer dated 16 September 1983 produced and marked as L–1, had offered to the plaintiff various banking facilities. Assecurity, the plaintiff had charged its properties held under grant no 10672–10678 for lots 143–149, Section 14 Bandar and Daerah Klang Selangor (hereinafter referred to as the said lands) vide a charge dated 13 March 1984 (L–2 A&B).

[2] As further securities, the plaintiff had executed a debenture instrument dated 10 March 1984 (marked as L–3), and a personal guarantee (L–4) together with its directors in favour of the first defendant. In every aspect that debenture was in order, as it had been secured by a charge over the borrowing company's property ie the plaintiff (*Lipton & Herzberg's Understanding Company Law in Malaysia* by Krishnan Arjunan and Low Chee Keong; see also s 108 of the Companies Act 1965).

[3] Due to bad times, the plaintiff had failed to service the facilities, which had led to the filing of legal proceedings against the plaintiff as a guarantor on 11 December 1991 as per Kuala Lumpur Civil Suit D1–22–1691 of 1991 by the first defendant. The latter case is still being proceeded with by the first defendant albeit facing stiff resistance from the plaintiff. That court action is another story and merely incidental to the current one.

[4] By various letters dated 22 March 1995, 28 April 1995 and 16 May 1995 the first defendant had informed the plaintiff of its intended action to exercise its rights under the debenture. Advertisements were placed in the relevant local vernacular and tenders were invited for the sale of the said land. In the midst of all these activities, sometime on 29 September 1994 an order of winding up was successfully obtained against the plaintiff by a third party ie Automative Corporation Sdn Bhd resulting in the plaintiff's inability to object to the ongoing tender pursuant to the debenture. Matters became more complicated when the plaintiff's shareholders settled the debts and successfully stayed the winding up order (though for some unknown reason had not set aside the order).

[5] As regards this current case, in its attempts to recover the debts due, the first defendant had merely adverted to the debenture thus sidelining any foreclosure proceedings or judicial sale pursuant to the National Land Code, read together with the requirements of the Rules of the High Court 1980.

Inthe course of the hearing the plaintiff had highlighted that certain parties connected to it had frantically attempted to join the bid affray, but had met with frustration as the said land was eventually sold to the second defendant, as per L–13 dated 24 October 1995.

[6] Now the plaintiff, in a gist wants to set aside that sale by the first defendant to the second defendant, on the premise that the sale vide the debenture was invalid as its advertence was inhibited by time factor. The plaintiff had explained that the debenture was exercisable on demand as provided for under section 6.01 of the debenture. To support its contention of the demand requirement and strict adherence to time factor the plaintiff had referred to the case of *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd* [1989] 3 MLJ 155. In that case the Supreme Court had indeed held that an antecedent demand was a pre-requirement before filing a claim against a guarantor.

[7] Inspite of the prevalence of many letters in the like of those dated 22March 1995, 28 April 1995 and 16 May 1995 the plaintiff had ignored them but had merely focused on the demand letter dated 24 July 1989 (L–15). This letter in crystal clear terms had stated that an outstanding sum of $1,617,252.61 was due and owing to the first defendant as at 15 July 1987. Notice was thus given, intimidating that any failure to pay up the owed sum would result in legal proceedings being undertaken to recover it, inclusive of foreclosure proceedings. Due to the alleged lapse of time as regards the allusion to the debenture, the first defendant was supposed to have been time barred by 24 July 1993. Toreiterate, the sale to the second defendant was on 24 October 1995 way past the limitation period.

[8] The point of reference of the plaintiff pertaining to the demand factor *vis-a-vis*, the issue of limitation of time and strict adherence was s 6(1)(a) of the Limitation Act 1953 and *The Modem Contract of Guarantee* by O'Donovan and John C Phillips, in which were authored these words:

> Thus.... In Commercial Bank of Australia v Colonial Finance Mortgage Investment and Guarantee Corporation (1906) 4 CLR 57 the guarantee stated that the guarantors undertook to pay the debts of the customer 'in case the customer shall make default in payment thereof respectively or of any part thereof respectively on demand'. It was held that a cause of action arose against the guarantor in respect of the principal debt once the customer was in default and *a demand had been mode on the customer*. Thus the statute of limitation began to run against the creditor only when both these conditions were satisfied. (Emphasis added.)

[9] Banking on the Limitation Act, and supported by the above authoritative view, the plaintiff had submitted that the transaction of the sale and purchase of the said land on 24 October 1995 was therefore invalid, as time had begun to run once that demand had been made. Here time had run out by the time the deal was sealed. I pause here for a moment.

[10] Apart from the above complaint the non-appointment of any receiver and manager, after the first ones were terminated on 15 May 1989 to conduct the sale, had also made the tender invitation for the said land flawed. Thereupon the plaintiff prayed for orders in term, *inter alia*, that:

(i) A declaration be meted down declaring that the first defendant was not entitled after 23 July 1993 to enforce its rights under the debenture dated 10 March 1984 executed by the plaintiff in favour of the first defendant premised on it being time-barred;

(ii) the first defendant therefore was not entitled to execute the sale and purchase agreement dated 24 October 1995 as attorney to the plaintiff pursuant to a power of attorney clause contained in the debenture as regards the said land;

(iii) the sale of the said land therefore too was null and void and of no effect between the first and second defendants; and

(iv) that the sale of the said land to the second defendant be sat aside.

[11] At the early stages of the hearing the plaintiff had submitted that the sale instead should have been subject to s 256 (2) of the National Land Code read together with O 83 Of the Rules of the High Court, and even if advertence to the debenture had taken place, the transaction was invalid due to the above argument of time-bar. Even if it had not been time barred, the sale was flawed by virtue of the non-appointment of a receiver and manager, under s 6.02 of the debenture for purposes of the sale. Its argument therefore was multi-pronged.

[12] As regards the issue of the non-appointment of a receiver and manager, the stance of the first defendant was that as the debenture had appointed it as the plaintiffs attorney for the purpose of sale (section 6.06 of the debenture) its action was in order.

[13] So, what is so unique about a power of attorney that holds so much authority and persuasive power? Suffice for purposes of this case if I were to state that a power of attorney is a formal delegation, made in writing and usually under seal, empowering the donee, in this case the first defendant, to act on behalf of the donor (plaintiff). The purpose and powers will be defined within the limits of the instrument, and in favour of third parties, rendering all acts done by the donee to be binding on the donor as effectually as if the third parties had dealt directly with the donor himself. Needless to say the delegation of the purpose and authority must be legally possible and within the capacity of the donor to give. In essence what is flowing from the donor to the donee is the authority.

[14] Further, every experienced legal practitioner knows that s 114(e) of the Evidence Act 1950 provides that a court may presume that any judicial and official act done has been regularly done. This provision when resorted to invariably support the position of the current first defendant, as with its

promulgation the burden of proof statutorily shifts to the plaintiff, thus placing it in an unenviable position of rebuttal. It is thus burdened with the responsibility of rebutting the regularity of the power of attorney, which had been deposited in the High Court, apart from explaining why there was no challenge to it.

[15] After a scrutiny of the evidence I was satisfied that a valid power of attorney had indeed been executed appointing the first defendant as the plaintiff's attorney. That meant it had ample authority, and hence *prima facie* empowered to sell, bearing in mind that that document had been duly deposited with the High Court and evidentially never challenged. Regardless of the simplicity of that statement two more questions must be answered *viz*:

(i) if the plaintiff at the relevant time had been wound-up was the power of attorney considered cancelled; and

(ii) in the circumstances of the case, as a stay of the winding up order had been obtained by the plaintiff, what was the effect vis-a-vis the sale?

[16] The law as to the first question is quite clear, in that the status of the power of attorney granted by a company, later to be wound up, in this case the plaintiff to the first defendant, is not cancelled by that windingup order (*Wellington Steam Ferry Co (Ltd) (In Liquidation) & Anor v The Wellington Deposit, Mortgage and Building Association (Ltd)* (1915) 34 NZLR 913; *K Balasubramaniam, Likuidator bagi Cosmopolitan Credit & Leasing Sdn Bhd (Dalam Likuidasi) v MBf Finance Bhd* [2005] 2 MLJ 201.

[17] I now answer the second question. It is my view that if a fullblown winding up order has no ill effects on that power of attorney surely that stay order granted by a court merely strengthened the hands of the first defendant being a secured creditor (*K Balasubramaniam v MBf Finance Bhd*). I was satisfied in the circumstances of the case, having perused the debenture especially sections 6.02, 6.03, 6.04, 6.05 and 6.06 and as the sale had been pursuant to that power of attorney undertaken by the first defendant, the factor of want of receiver and manager had become quite irrelevant. The first defendant being a secured creditor had chosen the easy way out of alluding to the power of attorney embedded in the debenture to transact the sale rather than appoint a receiver and manager to act for it (see section 6.02 of the debenture which provides for that discretion).

[18] Moving on from there, with the issues of power of attorney and the receiver and manager argument out of the way, necessity dictates me to move on to the contentious next stage ie the allusion of the debenture supposedly invoked out of time.

[19] Along the way during the submission, in particular after the first defendant had submitted that the debenture was an alternative security exercisable by a secured creditor, independent of the charge under the National Land Code,

the plaintiff had made a few adjustments in its stance. This time the plaintiff conceded that the first defendant was certainly entitled to select any one of the securities to secure the realisation of the defaulted sum. I too must endorse this view, in that those security charges were independent of each other.

[20] Despite that change of stance, the plaintiff strangely had pressed on to state that despite that concession, and despite the first defendant's right to advert to the debenture, the sale was still flawed as s 256 (2) of the National Land Code and O 83 of the Rules of the High Court had not been complied with. Having taken into consideration the concession by the plaintiff that these three securities were independent of each other I was moved to reject the latter's legal approach. I was satisfied that so long as the provisions of the debenture instrument, more so as the power of attorney was valid, and any other connected statutory requirements had been compiled with, the sale thus was good without the necessity of going through the processes of a judicial sale (see *Melantran Sdn Bhd v Corah Enterprise Sdn Bhd & Anor* [2003] 2 MLJ 193; *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (In Liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805).

[21] But must a notice of demand be sent first before enforcing the sanctions of the debenture? To answer this question, perhaps it would not be incorrect to approach the matter by stating that to preclude the enforcement of any debenture of any time frame, after a notice of demand has been sent, would import uncertainties to the borrower, as he would be beholden to the arbitrary time frame of the debenture holder. As admitted by the first defendant, if in a foreclosure action a period of twelve years is still imposed by Parliament why not this sale ? Needless to say, as a notice of demand had not be specifically provided for to be precluded in the debenture instrument, in stark contrast to the need for it, any argument of denial of its requirement was a none starter. As far as I was concerned agreeably a demand was required before the debenture was to be enforced by the first defendant. Evidentially if six years had not lapsed after the appropriate or proper letter of demand had been sent out ie when the cause of action had accrued, and as stated earlier the other prerequisites of s 6 of the Limitation Act had been complied with, then the sale under the debenture was not flawed.

[22] To appreciate the issue here a reproduction of s 6 of the Limitation Act is necessary. Section 6 reads:

> 6 Limitation of actions of contract and tort and certain other action
>
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (a) actions founded on a contract or on tort;
>
> (b) actions to enforce a recognizance;
>
> (c) actions to enforce an award;

(d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

[23] Returning to the above provisions, to fall within the ambit of the above s 6, and without much legal discussion, suffice to say that the impugned debenture qualifies as a contract. *Lipton & Herzberg's Understanding Company Law* in Malaysia by Krishnjnn Arjunan and Low Chee Keong at p 176 even had occasion to write:

> The term 'debenture' does not have a precise legal definition as it is the nature of a genus, not a species. It is a document which acknowledges the indebtedness of the company. The debt is often secured by a charge over the property of the company but this is not necessary. The relationship *between the company and a debenture-holder is governed by the law of contract* and if the debenture is secured, also by property law. (Emphasis added.)

[24] The action of the first defendant to sell the said land founded on that contract/debenture, ie after the cause of action had accrued brought into being by the demand letter, fell squarely within the four corners of the terminology of 'action' as promulgated under s 2. This section reads:

> 2 Interpretation
>
> action includes a suit or any other proceeding in a court of law; … (Emphasis supplied.)

[25] By the canon of construction, bearing in mind that the above definition is non-exhaustive, as the term 'includes' has been legislated by Parliament, Iam convinced that a sale under the impugned debenture is certainly covered by it. Not only does s 6 cover suits or any court proceedings but also actions under (a), (b), (c), and (d) of sub-s 1 of s 6, which are independent of court proceedings. It is trite that the Limitation Act is a procedural law that must be strictly construed within the context of its provision and purpose. This Act must be construed wherever possible in the light of the principles of natural justice, which must inevitably tilt towards the facilitation of justice and eventually furthering its ends. With those ends in mind and the terminology of 'action' being wide enough to include the impugned sale, my next step would be to identify that correct letter of demand sent by the first defendant, purposefully to check on the time factor.

[26] Having perused the evidence it my view that the first defendant was never time barred, as the correct notice of demand to be considered must be that of L–6 found at p 51 of encl 2 and not of L–15 (p 107). L–6 is dated 16May 1995 whilst L–15 is dated 24 July 1987. I am unable to submit to the plaintiff's interpretive view that L-15 is a catch-all notice that will bind any of the securities without the necessity of identifying the targeted intended security. To acquiesce to such a view would militate against the concession by all parties that all the three securities were independent of each other. Naturally, in the

event the threats of that notice ie L–15 were to be crystallised, then all the relevant requirements of the National Land Code and strict procedural compliance of the Rules of the High Court 1980 must be adhered to.

[27] Let us review L–15 dated 24 July 1987 which verbatim reads:

> TAKE NOTICE that we are now instructed to demand from you, which we hereby do, payment of the sum $1,617, 252.61 together with interest thereon and our legal costs of $30.00 to our clients or to us as their solicitors within fourteen (14) days from the date hereof, failing which legal proceedings including foreclosure proceeding will be instituted against you for the recovery thereof and all legal expenses are to be borne by you.

[28] The first defendant had ingeniously argued that this letter was not a demand letter under the debenture but a demand for outstanding sum, failure of which to pay would result in legal proceedings, inclusive of foreclosure action. The latter had stressed that nothing was stated in that letter of the issue of the debenture. Having appreciated the language of the letter I was satisfied that the sender of this letter had legal proceedings only in mind in the event of non-payment of the debts due. Naturally if the debenture were to fall within the context of legal proceedings then the sale would be flawed as it would be time-barred but not otherwise. To reiterate, apart from concluding that this demand notice merely targeted the legal charge pursuant to the National Land Code, the enforcement of the sale under this debenture therefore does not fall within that envisaged legal proceedings (L–15).

[29] Returning to the main stream if a proper notice of demand, which identified the debenture as the foundation of that demand were sent out, and six years did go by, any sale after that period would be invalid. I now make a finding of fact that L–15 was never the proper notice of demand connected to the sale of the impugned land. After sifting the evidence I was satisfied that the correct and proper letter of demand, in relation to the enforcement of the debenture to be considered, was L6C (encl 2 p 51), dated 16 May 1995. This letter sent by the first defendant's solicitor to the plaintiff read:

> We write further to our letter dated 5 May 1995.
>
> Our instructions are to give notice (which we hereby do) that following our client's exercise of their right to take possession and control of the premises under reference our client will now, pursuant to section 6.05 of the debenture dated 10 May 1984 at the expiry of seven (7) days from date hereof proceed to sell the said property.
>
> The aforementioned sale will be pursuant to the terms and condition of the debenture be in such manner as our client shall think proper. (Emphasis added.)

[30] The above demand letter not only indicated that the debenture was adverted to but had even meticulously mentioned the relevant section. To cut the matter short, suffice if I were to conclude that as the letter was dated 16 May 1995

and the sale was dated 24 October 1995 the transaction was never in danger of being time-barred.

[31] It is without hesitation that this application be dismissed with costs.

Application dismissed.

Reported by Lim Lee Na